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Supreme Court of the United States

OCTOBER TERM 1943

No. 810

PHILIP EGNER, FREDERICK C. MAYER and SHAPIRO, BERNSTEIN & CO., INC.,

Petitioners,

against

E. C. SCHIRMER MUSIC COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, AND BRIEF IN SUPPORT THEREOF

JOSEPH FISCHER,
Counsel for Petitioners.

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against

E. C. SCHIRMER MUSIC COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully pray for a writ of certiorari to review the decree of the United States Circuit Court of Appeals for the First Circuit entered December 29, 1943, in the above entitled cause and as cause therefor respectfully show:

Statement

The action was brought under the Copyright Act (U. S. C. Tit. 17) to enjoin the alleged infringement of copyright of a musical composition variously known as "The Caisson Song", "The Artillery Song" and "The Caissons Go Rolling Along". The complaint alleges in substance (R. 2-5) that the song was composed by Edmund

L. Gruber; that prior to June 8, 1921, he assigned the composition, together with all rights therein, including the right to secure copyright therefor, to plaintiffs Egner and Mayer; that, on June 8, 1921, Egner and Mayer published the song in a book or collection of "Songs of the United States Military Academy, West Point, N. Y." and thereafter secured copyright of the book; that on January 23, 1936, Egner and Mayer assigned to Gruber all rights in the song, reserving a license to continue to publish and sell the book with the song incorporated therein; that on February 6, 1936, Gruber assigned to plaintiff Shapiro, Bernstein & Co., Inc., all rights in the song, with authority to institute and prosecute actions for infringement, and Egner and Mayer, by agreement of the same date, confirmed the assignment by Gruber to Shapiro, Bernstein & Co., Inc., with the reservation to Egner and Mayer of the license aforesaid; that plaintiff Shapiro, Bernstein & Co., Inc., has since been the sole proprietor of the exclusive right to print, publish and sell the song subject to the aforesaid license, and that defendant, after February 6, 1936, infringed the copyright by publishing a song entitled "Caisson Song", which was copied from plaintiffs' copyrighted song.

The answer (R. 7-8) denied authorship, copyright and infringement and avers that any rights plaintiffs ever had were lost by acquiescence, *laches* and delay in bringing suit.

Publication by defendant was conceded (R. 12) as also that if plaintiff has a valid copyright there is infringement (R. 23, cf. 48).

Plaintiffs' evidence showed, and the District Court found, that the song was an original musical composition written in 1908 by Edmund L. Gruber, who was an officer in an artillery regiment of the United States Army (R. 16, 142, 157-158, 172-3).

In 1921 plaintffs Egner and Mayer, the former being bandmaster and the latter organist and choirmaster in the United States Military Academy, were requested by Colonel

Danford, Commandant of Cadets at West Point, to compile a book of West Point songs (R. 23-5). He suggested including the Caisson song (R. 26, 162).

Having decided upon the songs to be included in the compilation (R. 29), Egner and Mayer then addressed themselves to the copyright question (R. 31). With particular reference to the Caisson song Mayer testified he had written Gruber and also conversed with him (R. 33, 36). (The correspondence was destroyed within a few months after the publication of the book [R. 35] and Gruber died shortly after this action was brought [R. 141, 164].) Mayer testified he wrote Gruber: "We wanted very much to have that song for our book and would he give us the rights for that purpose" (R. 33), and that Gruber's response, given either in a letter or orally, was: "'I give you the song and the right to copyright the song. It is understood that if in the future' . . . well, the only string that he interposed was that if in the future the song should possess potential value as a separate composition . . . it was understood that Lieut. Egner and I would do the fair and right thing by him" (R. 39). The District Court found (R. 17) that Mayer could not remember whether the so-called assignment was made prior to the date of his copyright; but Mayer testified (R. 40) that they went ahead with the arrangements for the printing and publication of the book "after we had definitely reached a basis for every single song in the book concerning the copyright protection or permissions". Publication was made June 8, 1921 (Plffs.' Ex. 2, offered R. 22, printed R. 193); and Mayer's final testimony on this subject is (R. 42) that he had Gruber's "complete word" before June 8, 1921.

Elliott Shapiro testified (R. 57-58) that when in the last week of December, 1935, or the first week in January, 1936, he entered negotiations with Gruber relative to the acquisition of the song by his firm (Shapiro, Bernstein & Co., Inc.), Gruber said, "Mr. Shapiro, I would like to give you those rights, but I have already parted with them . . . I

parted with the rights to Messrs. Egner and Mayer". After he took an assignment from Egner and Mayer (Plffs.' Ex. 8, offered R. 44, printed R. 201), Gruber delivered an assignment to Shapiro, Bernstein & Co. (Plffs.' Ex. 12, offered R. 59, printed R. 209), and a royalty contract (Plffs.' Ex. 13, offered R. 60-61, printed R. 211), accompanied by a letter and an affidavit (Plffs.' Exs. 14, 15, offered R. 64, printed R. 213), in which he stated that he had not authorized or consented to the publication of the song other than in the Egner and Mayer song book; in the letter (Ex. 14) he refers to their copyright, and, at his instance, as Shapiro testified (R. 65-6) his royalty contract (Plffs.' Ex. 13) was revised by eliminating the printed reference to an unpublished composition and substituting the words "original musical composition heretofore copyrighted by Egner and Mayer by arrangement with the writer".

After 1908 the song was played or sung at military functions and came into popularity during the first World War (R. 162). Then followed various other publications of the song. In January, 1918, Carl Fischer Inc. published "U. S. Field Artillery March, by John Philip Sousa" (R. 9, Deft.'s Ex. 19, offered R. 127, printed R. 253-6), in which Sousa incorporated most, if not all, of the Caisson song (R. 17). The song was also included in "Songs the Soldiers and Sailors Sing", published by Leo Feist, Inc. (R. 9-10, Deft.'s Ex. 21, offered R. 127, not printed, cf. R. 263-4). The words of the song, but not the music, were included in the "Army Song Book of U. S.", issued by the War Department 1918, for free distribution to all officers and men in the Army, and intended for use solely by song leaders in the Army (R. 10, 127, 168-9, Deft.'s Ex. 20, offered R. 127, not printed, cf. R. 263-4). It was published in the "Home and Community Song Book" by the Boston Music Company in 1919 (R. 10, Deft.'s Ex. 13, offered R. 88, not printed, cf. R. 263). The defendant's publication was a continuation of the same book (R. 7, 128, Deft.'s Ex. 18, offered R. 126-7, not printed, cf. R. 263). In 1920 C. C. Birchard published "The Boy

Scout Song Book", in which this song was included (R. 10, Deft.'s Ex. 17, offered R. 117, not printed, cf. R. 263).

There is no evidence of consent by Gruber to any of these publications.

It was included in several other publications after Egner and Mayer secured copyright registration in 1921.

Egner and Mayer's West Point Song book was published June 8, 1921, with proper copyright notice (R. 42-43, Plffs.' Ex. 1, offered R. 21, not printed, cf. R. 262), was issued to incoming cadets about July 1, 1921, and placed on sale at the cadet store and at the West Point Hotel (R. 43), and copyright registration therefor was secured (Plffs.' Ex. 2, offered R. 22, printed R. 193; Plffs.' Ex. 3, offered R. 22, printed R. 195-6).

Determination of District and Circuit Courts

The District Court found (R. 16) that Gruber was the composer and creator of this song; that (R. 17) Gruber did not assign all of his right, title and interest in the song in 1921 to the plaintiffs Egner and Mayer, but, at most, gave them permission to include the song in their West Point compilation; that (R. 17-18, 19) there was such a general publication of his work as to amount to a dedication of it to the public use; that (R. 20-21) the plaintiffs are barred by *laches;* and rendered judgment (R. 14-15) dismissing the complaint.

The Circuit Court of Appeals accepted the finding of the Trial Court that Gruber did not assign to Egner and Mayer in 1921 (R. 268); that the latter were licensees and held that as such licensees and not assigns they were not proprietors and therefore could not copyright the song when they copyrighted their compilation (R. 270), and that when their compilation was put on sale, this publication with the consent of Gruber amounted to such a general publication as to dedicate the song to the public and worked an abandonment of Gruber's common law right to a copyright, and affirmed the judgment (R. 269).

Jurisdiction

(a) The jurisdiction of this Court is invoked under

Copyright Act, Sec. 38, Act of March 4, 1909, C. 320, 35 Stat. 1084 (17 U. S. C. Sec. 38).

Judicial Code, Sec. 240 (a), as amended by Act of February 13, 1925 C 229, Sec. 1, 43 Stat. 938 (28 U. S. C. Sec. 347).

(b) The date of the decree sought to be reviewed is December 29, 1943 (R. 269).

Statutes Involved

The pertinent provisions of the Copyright Act (March 4, 1909 C. 320, 35 Stat. 1075 et seq., 17 U. S. C.) are as follows:

Section 3. "The copyright provided by this title shall protect all the copyrightable component parts of the work copyrighted . . . The copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this title."

Section 8. "The author or proprietor of any work made the subject of copyright by this title, or his executors, administrators, or assigns, shall have copyright for such work under the conditions and for the terms specified in this title . . ."

Section 25. "If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable: (a) to an injunction restraining such infringement; . . ."

Section 55. "In the case of each entry the person recorded as the claimant of the copyright shall be entitled to

a certificate of registration under seal of the copyright office . . . Said certificate shall be admitted in any court as prima facie evidence of the facts stated therein."

Questions Presented

The questions presented are as follows:

1. Whether the courts below were at liberty to disregard the evidence that Gruber in 1921 assigned to Egner and Mayer all his right, title and interest in the song.

Subordinate questions:

2. Whether upon the evidence there has been an abandonment of the song.

3. Whether upon the evidence the plaintiffs are barred by *laches*.

Reasons for Granting Writ

1. (a) The Circuit Court of Appeals has in this case decided an important question of federal law which has not been, but should be, settled by this Court. That question, the chief question here presented, relates to the quantum of proof requisite to establish an assignment as a basis for a valid copyright. The Circuit Court of Appeals appears to have rested its decision (R. 268) upon the findings of the Trial Court (R. 17), "that Gruber did not assign all of his right, title and interest in the song in 1921 to the plaintiffs Egner and Mayer, but at most, gave them permission to include the song in their West Point compilation" and upon that basis held the copyright invalid.

(b) The decision of the Circuit Court of Appeals sustaining the finding of the trial judge (R. 269) is also probably in conflict with the decision of this Court in *Chesapeake &*

O. R. Co. v. *Martin*, 283 U. S. 209, 216-7, 51 S. Ct. 453, holding that while the question of the credibility of witnesses is one for the jury alone, "this does not mean that the jury is at liberty, under the guise of passing upon the credibility of a witness to disregard his testimony, when from no reasonable point of view is it open to doubt" and the fact that the witness in that case was an employee of the petitioner was not enough, in the circumstances in that case to take the question to the jury. We submit that ruling is applicable here, although the trier of the facts was the Court and not a jury.

2. If petitioner's contention on this proposition is sustained then there arise the subordinate questions hereinbefore propounded.

(a) The ruling of the District Court (R. 17-18) that the singing of the song in army cantonments in 1917 and 1918, the Sousa publication and other publications constituted such a general publication as to imply an abandonment of the right of copyright. This ruling we submit is probably in conflict with the decisions of this Court in *Ferris* v. *Frohman*, 223 U. S. 424, 435, 32 S. Ct. 263, and *American Tobacco Co.* v. *Werckmeister*, 207 U. S. 284, 299-300, 28 S. Ct. 72. In the former case it was held that the public representation of a dramatic composition, not printed or published, does not deprive the owner of his common-law right save by operation of statute; and that at common law the public performance of a play is not an abandonment of it to public use. In the *Werckmeister* case this Court held in effect that a limited publication is not a dedication to the public.

(b) The ruling of the District Court (R. 20-21) that plaintiffs are barred by *laches* is probably in conflict with the decision of the Court in *Menendez* v. *Holt*, 128 U. S. 514, 524, 9 S. Ct. 143 (a trade mark case) to the effect that *laches* may defeat the remedy so far as the act complained of is

completed, "but so far as the act is in progress and lies in the future, the right to the intervention of equity is not generally lost by previous delay".

For these reasons it is respectfully submitted that this petition should be granted.

Dated: New York, March 21, 1944.

JOSEPH FISCHER,
Counsel for Petitioners.

BRIEF FOR PETITIONERS IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI

This is an application for a writ of certiorari to be directed to the United States Circuit Court of Appeals for the First Circuit to review the decree herein, the particulars of which are set forth in the foregoing petition.

Opinions Below

The opinion delivered by the District Court is reported in 48 F. Supp. 187, that of the Circuit Court of Appeals in 131 F. (2d) 398.

Statement of the Case

The essential facts of the case are fully stated in the accompanying petition for certiorari and in the interest of brevity are not repeated here. Any necessary reference thereto or elaboration thereof will be made in the course of the argument which follows.

Specification of Errors

The Circuit Court of Appeals for the First Circuit erred, it is respectfully submitted:

1. In holding that Gruber did not assign to Egner and Mayer in 1921 all his right, title and interest in the song.
2. In holding that Egner and Mayer were licensees, but not assigns.
3. In holding that Egner and Mayer were not proprietors of the song.
4. In holding that Egner and Mayer could not copyright the song when they copyrighted their compilation.

5. In holding that when the compilation of Egner and Mayer was put on sale at the West Point Hotel, this publication and sale with the consent of Gruber amounted to such a general publication as to dedicate the song to the public.

6. In failing to hold that there had been no abandonment of the right to obtain copyright.

7. In failing to hold that plaintiffs were not barred by *laches*.

8. In affirming the judgment of the District Court.

ARGUMENT

I

The evidence established an assignment by Gruber to Egner and Mayer.

The scope of the review: Under the amendment by this Court in 1939 of Rule 1 of the Rules of Practice in Copyright cases, proceedings in such actions are now governed by the Rules of Civil Procedure, in so far as not inconsistent with the Rules in copyright cases.

> Civil Procedure Rule 52, subd. (a) third sentence provides: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."
>
> The last sentence of subdivision (b) provides "When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or for judgment."

The third sentence of subdivision (a), according to the notes of the Advisory Committee, "accords with the decisions on the scope of review in modern federal equity practice". That scope was defined by Chief Justice Taft, in *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428, 444; 43 S. Ct. 445, as follows:

> "In that procedure an appeal brings up the whole record and the appellate court is authorized to review the evidence and make such order or decree as the court of first instance ought to have made, giving proper weight to the findings on disputed issues of fact which should be accorded to a tribunal which heard the witnesses."

The testimony as to the assignment comes from Mayer. Gruber died shortly after this action was brought (R. 141, 164). Mayer testified that he had written Gruber and conversed with him (R. 33, 36). The correspondence was destroyed within a few months after publication of the book (R. 35). The proof thus rested on Mayer's testimony. He testified (R. 33) that he had written Gruber for the rights, and Gruber responded either by letter or orally; he was uncertain which. However, that is not crucial, for it was competent for Gruber before copyright to transfer by parol whatever right he had to convey.

Callaghan v. *Myers*, 128 U. S. 617, 658, 9 S. Ct. 177.

While he did, to some extent, state his conclusion that Gruber gave him and Egner the right to print and copyright (R. 33, 34, 36, 38), he nevertheless testified as a fact (R. 39) that Gruber gave them the song and the right to copyright it; that Gruber stated (R. 34) this was the first time it had ever been published in the public domain with his consent and he emphasized the need of protecting it with a copyright; and (R. 42) that he had Gruber's complete word before the date of publication.

True, Mayer is a nominal plaintiff. But the only plaintiff in interest is Shapiro, Bernstein & Co., Inc. Egner and

Mayer were joined solely for procedural purposes. They had assigned to Gruber (Plffs.' Ex. 8, offered R. 44, printed R. 201). There was reserved to them (Plffs.' Ex. 9, offered R. 44, printed R. 201) the personal non-assignable right to publish the song as part of the "West Point Song Book" (R. 204). Mayer, therefore, had no possible interest in the outcome of this litigation; in any case, his right with Egner to continue to include the song in their book was preserved. His testimony was not contradicted, was not unreasonable or improbable or in its nature surprising or suspicious, and from no reasonable point of view was it open to doubt. Therefore the Trial Court was not at liberty to disregard his testimony (cf. *Chesapeake & O. R. Co.* v. *Martin*, 283 U. S. 209, 216-217, 51 S. Ct. 453).

Furthermore, it was supported by the testimony of Elliott Shapiro that Gruber told him he had parted with his rights to Egner and Mayer (R. 57, 58).

II

There was no dedication or abandonment.

Public rendition of the song prior to copyright was not an abandonment.

Ferris v. *Frohman*, 223 U. S. 424, 435, 32 S. Ct. 263.

Nor would limited publication, as, for example, the distribution of the words only to officers and men in the Army for use solely by song leaders in the Army (R. 10, 127) constitute a dedication to the public (cf. *American Tobacco Co.* v. *Werckmeister*, 207 U. S. 284, 299-300, 28 S. Ct. 72).

There is no evidence that Gruber consented to any of the publications of the song prior to the publication and copyright registration by Egner and Mayer. There is no evidence that he knew of any such publication. Sousa's might appear to be an exception (R. 167) but Danford had never seen the song in print prior to the Egner-Mayer publica-

tion (R. 148, 162); so Danford, speaking of Gruber's knowledge (R. 167), must have referred to some later time; and this has confirmation in his further testimony (R. 167) that he never heard Gruber refer to the publication of the song by others during the years immediately preceding 1921.

It is submitted, therefore, that a finding of abandonment or dedication prior to the Egner and Mayer copyright is without support in the evidence.

After the assignment by Gruber and the publication and registration by Egner and Mayer, Gruber had no right or power to authorize publication.

Goldmark v. *Kreling*, 35 Fed. 661-662.

And it would necessarily follow that his conduct after he had divested himself of ownership should not constitute the basis for a claim of abandonment.

The Circuit Court held (R. 268) that when the Egner-Mayer compilation was put on sale at the West Point Hotel this publication and sale with the consent of Gruber amounted to such a general publication as to dedicate the song to the public and worked an abandonment of Gruber's common-law right to a copyright.

It may be conceded that, when a work is copyrighted or is published generally without copyright, there is an end of the so-called common-law copyright; but it is submitted that when publication is made by the authority of the proprietor with proper copyright notice that does not constitute a dedication of the work to the public, but rather a substitution of the statutory for the common-law copyright.

Bobbs-Merrill Co. v. *Straus*, 147 Fed. 15, 19, 77 C. C. A. 607, aff'd 210 U. S. 339, 28 S. Ct. 722.

III

Plaintiffs are not barred by *laches*.

The Trial Court based its finding of *laches* exclusively on the factor of delay (R. 20). It is submitted that mere delay is insufficient to bar plaintiffs; it must appear that the delay has worked to the disadvantage of the defendant. If the conduct of defendant has not been induced or varied by anything done or omitted by plaintiffs or Gruber, there are no *laches*.

Gilmore v. *Anderson*, 38 Fed. 846, 848.

While *laches*, in the sense of mere delay in bringing suit may defeat a preliminary injunction, it will not, on final hearing, prevent the Court from granting relief against continuance of the infringement.

Cf. *Sawyer Spindle Co.* v. *Taylor*, 69 Fed. 837, aff'd 75 Fed. 301, 22 C. C. A. 203 (a patent case).

In a trade-mark case it was held by this Court that

> "Where consent by the owner to the use of his trade-mark by another is to be inferred from his knowledge and silence merely, 'It lasts no longer than the silence from which it springs: it is, in reality, no more than a revocable license'.
>
> "So far as the act complained of is completed, acquiescence may defeat the remedy on the principle applicable when action is taken on the strength of encouragement to do it, but so far as the act is in progress and lies in the future, the right to the intervention of equity is not generally lost by previous delay, in respect of which the elements of an estoppel could rarely arise."

Menendez v. *Holt*, 128 U. S. 514, 524, 9 S. Ct. 143.

It does not appear that defendant's conduct was induced or that it has been prejudiced by any act or omission on the part of plaintiffs or Gruber. Plaintiffs have stipulated, if successful (R. 13-14) to waive damages, accounting for profits, costs and counsel fees, and that defendant may, without royalty payment, dispose of the remainder of their present editions containing The Caisson Song (extended at the trial (F. R. 23) to include two additional editions) giving proper copyright credit; and Mr. Schirmer testified (R. 132) that to the extent that defendant has been permitted to sell these books, it has not been prejudiced by the delay in bringing action.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

JOSEPH FISCHER,
Counsel for Petitioners.

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PHILIP EGNER, FREDERICK C. MAYER AND SHAPIRO, BERNSTEIN & CO., INC.,
Petitioners,

v.

E. C. SCHIRMER MUSIC COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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PHILIP EGNER, FREDERICK C MAYER AND SHAPIRO, BERNSTEIN & CO., INC.,
PETITIONERS,

v.

E. C. SCHIRMER MUSIC COMPANY,
RESPONDENT.

RESPONDENT'S BRIEF

IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The petitioners seek to review a decision of the United States Circuit Court of Appeals for the First Circuit which unanimously affirmed, on the law and on the facts, a decision of the United States District Court for the District of Massachusetts, dismissing the bill of complaint after a full trial.

The facts are fully set forth in the decisions of the District Court (48 Fed. Supp. 187) and of the Circuit Court of Appeals (139 Fed. (2d) 398) and, so far as material to the questions presented, are hereinafter stated. The Circuit Court of Appeals found that the findings of fact by the District Court were not erroneous. Nor do the petitioners claim that the findings are unsupported by evidence.

POINT I.

No Question of Federal Law or of General Public Importance is Presented.

The musical composition involved in this action is "The Caisson Song". As shown by the decisions of the lower Courts, the ruling in this case was based on the particular facts and circumstances surrounding the activity or lack of activity on the part of the author or proprietor of that song. Obviously the ruling with respect to these matters is limited to the facts in this case. It is therefore difficult to contemplate any other case involving substantially identical or similar facts. The decision in this case cannot therefore be considered as one of general public importance.

POINT II.

The Decision of the Circuit Court of Appeals, First Circuit, is Not in Conflict With the Decisions of Any Other Circuit or of This Court.

Although petitioners cite the following cases as "probably" in conflict with the decision of the Court below, they fail to support such contention.

In *Chesapeake & O. R. Co.* v. *Martin,* 283 U.S. 209, this Court expressed its unwillingness to disturb the findings of the Court below "unless the evidence be of such a nature as fairly to be open to challenge as suspicious or inherently improbable" (p. 214). The evidence in this case supporting the finding of the Trial Court cannot be so characterized.

In *Ferris* v. *Frohman,* 223 U.S. 424, the Court held that the performance of a play was not a "publication" thereof. In the instant case it appeared without contradiction that the composition had been printed and sold openly and unrestrictedly for many years. Such distribution of a literary or musical work constitutes "publication" sufficient to dedi-

cate the work to the public use unless accompanied by compliance with the Copyright Statute.

In *American Tobacco Co.* v. *Werckmeister*, 207 U.S. 284, this Court held that the exhibition of a painting under restrictions was not a "publication". This is not in conflict with the decision of the Circuit Court below, because in this case as already stated, there was an unrestricted printing, sale and distribution of the work.

Nor is the decision of the Circuit Court below on the effect of the long continued failure to assert rights to the composition in conflict with the decision of this Court in *Menendez* v. *Holt*, 128 U.S. 514. On the contrary, the decision of this Court in the cited case recognizes that a delay or acquiescence may be "continued so long and under such circumstances as to defeat the right itself". The Trial Court found as a fact that in the instant case there was a "delay of nearly a quarter of a century in asserting his rights to copyright" (R. 20).

POINT III.

This Court Will Not Review Questions of Fact, Nor Concurrent Findings of Fact.

The District Court found:

(a) That "The Caisson Song" was abandoned or dedicated to the public use.

(b) That the composer never assigned the musical composition to Egner and Mayer and consequently that Egner and Mayer never became the proprietors thereof.

(c) That although "The Caisson Song" was being openly notoriously and continuously published by others, Gruber, the author, never asserted any rights of ownership for over 20 years. Egner and Mayer likewise made no protest.

These facts having been found by the District Court, the legal conclusion necessarily followed that the composition

was not protected by statutory copyright because of failure to comply with the statute and because of a long continued failure to assert rights therein which amounted to an abandonment thereof.

As has been well said:

> "In the last analysis, publication, or dedication to the public, is a question of fact in each case." Weil on Copyright, page 157.

In such cases this Court will not grant certiorari for the purpose of reviewing the evidence or the inferences drawn from it.

> *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 178.

Finally, in the present case, as in *Goodyear Tire & Rubber Co.* v. *Ray-O-Vac Co.*, 64 S. Ct. R. 593, 594:

> "The Circuit Court of Appeals re-examined the findings in the light of the evidence and accepted them. It must be a strong case in which this court will set aside these concurrent findings of two courts."

POINT IV.

The Finding That There Was no Assignment by Gruber to Egner and Mayer is Amply Supported by the Evidence.

The petitioners admit that some evidence supports the finding of both Courts that there was no assignment by Gruber to Egner and Mayer. They only question the "quantum" of proof submitted. They suggest that the District Court was not justified in rejecting the testimony of Mayer, stating at page 14 of their brief:

> "His testimony was not contradicted, was not unreasonable or improbable or in its nature surprising or sus-

> picious, and from no reasonable point of view was it open to doubt."

The contrary appears clearly from the record.

Mayer's testimony with respect to the purported assignment was so vague and uncertain that the District Court stated as a fact that he (Mayer)

> "could not state or remember whether that assignment was oral or written. Nor could he remember that the so-called assignment was made prior to the date of his copyright." (R. 17)

Mayer's entire testimony with respect to the critical points was speculation as distinguished from actual recollection.

But in addition to this, Mayer's testimony was directly contradicted. General Danford testified that he was "under the impression that no arrangements at all were made than through me to give permission to the publishing of same." (Q. 74, R. 164–165.) Plaintiffs' Exhibit 9, the agreement between Egner and Mayer and Shapiro, Bernstein & Co. (R. 201) recited that Egner and Mayer acquired from Gruber "the right and license to print, publish and sell the musical composition". This is the language of a license and falls far short of the complete transfer alleged in the complaint and which Mayer unsuccessfully attempted to establish.

Gruber's subsequent conduct contradicts the claim that he had assigned the song to Egner and Mayer. In 1930 Gruber for the first time attempted to copyright the song, claiming then to be the proprietor thereof. This is inconsistent with the assertion that Gruber had conveyed the song to Egner and Mayer nine years prior thereto. Furthermore, in the application for copyright filed by Gruber (Dft's Ex. 11B, R. 243) in 1930, he stated that he was the author of the words and that the song was then being published for the first time.

Also, in November 1930 Gruber authorized the publication by the Hoover Company of a commercialized parody of the song and sanctioned its earlier use over the radio by the Hoover Company (Dft's Exs. 4 and 5, R. p. 229). Gruber, by thus asserting his ownership of the song, directly contradicted the claim of Mayer that Gruber had conveyed the song to Egner and Mayer in 1921. The circumstances surrounding the use of the song by the Hoover Company under the authority of Mr. Gruber are set forth at length in the opinion of the District Court (R. 18). Because of these circumstances, the District Court was amply justified in finding (R. 17):

> "that Gruber did not assign all of his right, title and interest in the song in 1921 to the plaintiffs Egner and Mayer, but at most gave them permission to include the song in their West Point compilation."

CONCLUSION.

The petition for writ of certiorari to the United States Circuit Court of Appeals for the First Circuit should be denied.

Respectfully submitted,

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Boston, Mass.